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From Economic Inequality to Economic Freedom: Constitutional Political Economy in the New Gilded Age

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INTRODUCTION

We live in a new Gilded Age. In the years since the 2008 financial crisis, it has become increasingly clear that income inequality is widening dramatically, and that social mobility and genuine economic opportunity are an illusion for most Americans. Such economic inequality magnifies and interacts with chronic crises of structural racial injustice and persisting political dysfunction. The urgency of this moment is reflected not only in the virulent exclusionary populisms resurgent on the right, but also in the wide array of social movements and reform communities mobilizing on the left: from alternative labor organizing among low-wage and “gig” economy workers; to new civil rights movements working at the intersections of racial, economic, and political exclusion; to efforts at reforming our democratic institutions themselves. This project of challenging inequalities of income, opportunity, standing, and voice presents a central challenge for contemporary legal doctrine, practice, and scholarship. What is the role of law in constructing inequalities and exclusions? How can law and institutional structures be reconceived to create a more inclusive and egalitarian society?

It seems obvious that this project would necessarily raise constitutional questions. To understand the constitutional dimensions of contemporary threats to freedom, inclusion, and equality, we must distinguish between two modes by which constitutionalism can grapple with these questions. First, there is what we might call “big-C Constitutionalism”—the constitutionalism of text and doctrine, of the document itself and its interpretation by the Supreme Court. On this familiar approach to constitutional law, battles for a more equitable and inclusive polity play out on the terrain of doctrinal and textual interpretation, seeking hooks in constitutional text and precedent to ground more robust demands for equality and inclusion.

But there is a second mode of constitutional thought and argument, which we might call “small-c constitutionalism.”¹ This approach invokes constitution-

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alism in another, more literal sense. What are our most fundamental moral values—the values through which we aspire to *constitute* ourselves as a society? In what ways ought these values *constitute*—as in, construct, structure, and shape—our fundamental institutions of political, economic, and social order, from Congress to elections to markets, to patterns of discrimination? Constitutionalism in this second sense is fundamentally bottom-up, broadening the terrain to encompass social movements and public philosophical appeals to moral touchstones like “equality” and “freedom.”² It encompasses arguments about fundamental values and structure that may implicate not only judicial decisions but also legislative and regulatory ones. These values may well be better and more rapidly realized through statutory or bureaucratic policies, creating what Cass Sunstein calls “constitutive commitments” enshrined in statutes and policies that have a higher moral stature for their fundamental role in structuring our polity and economy: the Social Security Act, the Fair Labor Standards Act, the Voting Rights Act, and others.³

In this mode of constitutionalism, the domain of constitutional text and Supreme Court doctrine remain important, but are no longer the primary sites of struggle. Rather than seeing courts as heroic vanguards, with this view, courts are instead laggards. The real heavy-lifting may well be done in other arenas of

1. In this Essay, for purposes of clarity and conciseness, I have avoided the language of “popular constitutionalism.” The relationship between the notion of constitutionalism advanced here and the literature on popular constitutionalism is complementary, but requires greater elaboration than can be done here. I follow the line of popular constitutionalist argument insofar as popular constitutionalism makes a claim about the validity of legislatures, social movements, and ordinary citizens taking charge of the project of interpreting constitutional text and meaning. This view of small-c constitutionalism echoes other efforts to shift the focus of constitutional-level deliberation to the domains of legislation and regulation.
2. See, e.g., WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010) (outlining a framework for understanding legislation and statutory change in terms of small-c constitutional deliberation about our basic structures and commitments); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013) (exploring how battles over regulation in the administrative state can involve constitutional interpretation over rights and structures, engaging a wider array of policymakers and social movements in constitutional deliberation). What I add here is a push for small-c constitutionalism to also entail efforts to define foundational moral concepts like freedom and equality in the context of changing socioeconomic conditions through the work of social movements, public philosophy, and more technical efforts at legal and policy reform in cities, bureaucracies, legislation, and the like. Such constitutionalism need not take the form of rights claims, but can be framed in broader public philosophical terms. See MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 4 (1996) (describing the concept of public philosophy as the public debate over philosophical concepts and values).
3. See generally ESKRIDGE, JR. & FEREJOHN, *supra* note 2; CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004); William E. Forbath, *Constitutional Welfare Rights: A History, Critique, and Reconstruction*, 69 FORDHAM L. REV. 1821 (2001).

movements and public discourse, manifesting in local, state, or regulatory policy changes, and only later shaping the high politics of Supreme Court jurisprudence. Constitutionalism, in other words, should be thought of as a part of the more diffuse project of moral debate and reform that starts *on the outside* through movements and small-scale reform efforts, working its way *in* towards federal and constitutional codification later on. Understood in this way, the constitutionalism of text and doctrine does not supplant or drive social change. Rather, it complements, magnifies, and deepens reform efforts, activated by and responding to battles already underway at the level of public philosophy, social movements, and local or regulatory reforms.

This Essay has two central goals, one substantive and one methodological. Methodologically, I want to suggest that a progressive response to today's inequality crises requires such a small-c constitutionalist approach. This shift to small-c constitutionalism is ultimately a catalyst for driving progressive social change. It is not at all clear that either constitutional doctrine of Supreme Court jurisprudence ought to be, or indeed ever was, the primary driving vector for an egalitarian, democratic vision of our society. Indeed, the recent experience of Supreme Court jurisprudence has been fraught for progressives. As a number of critics have rightly noted, the Roberts Court has consistently exacerbated structural inequalities, evincing a kind of neo-*Lochnerism*. Just as the *Lochner* court struck down progressive labor protections in the name of the freedom of contract and a presumption against regulations that promoted the interests of particular constituencies such as workers—who to the Court seemed to be a vested interest rather than a group in need of regulatory protection⁴—so too has the Roberts Court promoted “free market” visions of politics and economics, for example by loosening regulations on campaign finance and voting rights, considering First Amendment concerns about economic regulation, and asserting freedom of contract by upholding arbitration clauses.⁵ By contrast, as a growing number of scholars are suggesting, we should understand the history of social movements and legislative or regulatory reforms battling for economic opportunity and inclusion as a mode of constitutionalism. For these scholars, the task of combating inequality is one of “constitutional political economy”—the project of interrogating and reforming the values and structures that shape our col-

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4. For a historical account of the *Lochner* court, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).
 5. On the neo-*Lochnerism* of the Roberts Court, see, for example, David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *LAW & CONTEMP. PROBS.* 1, 1–4 (2014) (situating the Roberts court in a broader critique of “neoliberal” valorizations of market- and consumer-choice views of freedom); Ellen D. Katz, *Election Law's Lochnerian Turn*, 94 *B.U. L. REV.* 697, 706–09 (2014) (critiquing the Roberts Court's election law decisions as undermining democracy based on an implicit and narrow view of liberty); and Jedediah Purdy, *The Roberts Court v. America: How the Roberts Supreme Court Is Using the First Amendment To Craft a Radical, Free-Market Jurisprudence*, 23 *DEMOCRACY*, Winter 2012, <http://democracyjournal.org/magazine/23/the-roberts-court-v-america/> [<http://perma.cc/A78E-UA4P>] (describing the Roberts Court's revival of *Lochner*-style reasoning and its resultant exacerbation of economic inequalities).

lective social, economic, and political life.⁶ It is simply too much to ask of courts and the constitutional text alone to bear the burdens of moral judgment, persuasion, and policy innovation. By shifting our focus to public philosophy, social movements, legislation, and regulation, we put courts in their proper role as part of a larger ecosystem of actors, arenas, and institutions grappling with social change.

Second, I offer in this Essay the beginnings of a substantive argument as well, sketching what a progressive vision of constitutional political economy might look like when tailored to the multiple and overlapping crises of social, economic, and political inequality. The ongoing (small-c constitutional) battles already under way between movements and policymakers over the changing economy suggest the beginnings of a robust, progressive vision for constitutional political economy that advances a view of economic freedom suited for our current moment. This Essay excavates and distills these implicit ideas into a broader normative framework for economic freedom in the twenty-first century.

Any successful progressive moral vision for the new economy must ultimately meet several criteria. The Essay will engage each of criteria in turn. First, we must develop a substantive moral vision that diagnoses the root problems of inequality and unfreedom, and offers a moral alternative (Part I). Second, this moral vision must translate into strategies that target the most central sources of unfreedom and inequality (Part II). What structural changes and policies must we push for in light of these moral values? Third, these reform imperatives must be accompanied by a theory of social change (Part III). How can we go about making this vision a reality? What are the relationships between law, advocacy, reform, and social movements? Finally, any such vision must offer at least a partial account of where progressivism goes wrong. In what ways does this vision and approach to social change remedy not only flaws of our current system but also limitations of previous attempts at progressive change? The Essay will conclude with some brief reflections on these final questions.

I. DOMINATION, DEMOCRACY, AND ECONOMIC FREEDOM

The term “inequality” has catapulted to the center of progressive arguments for reforming fundamental political and economic structures. Popularized by the Occupy Wall Street movement and intellectualized by the firestorm of interest around Thomas Piketty’s *Capital in the Twenty-First Century*,⁷ it has been absorbed by progressive reform candidates like Mayor Bill de Blasio in New

6. See Joseph Fishkin & William Forbath, *Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Inequality*, 94 TEX. L. REV. 1287 (2016); Joseph Fishkin & William Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669 (2014); K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329 (2016) [hereinafter Rahman, *Domination*]; Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445 (2015).

7. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2013).

York and Senator Bernie Sanders, even shaping much of Secretary Hillary Clinton's recent campaign rhetoric. But inequality and its implied positive alternative, equality, do not in fact capture the moral challenges of this New Gilded Age. Rather, inequality is ultimately about more than just disparities of income. The narrowing of economic wellbeing and opportunity arises from deeper, more systemic changes in the very structure of work, markets, and geographies that limit the kinds of mobility, opportunity, and welfare reachable by most Americans. Rather than focusing on inequality in its narrow sense, then, we must address these structural dimensions of inequality. This in turn suggests the need for a different set of guiding moral concepts: the problem of *domination*, and the positive value of *agency*.⁸

Domination refers to the concentration of arbitrary, unchecked power that constrains the agency and capacities of individuals and communities.⁹ Domination is the morally troubling condition of being subject to another's will: even if the other entity treats you well, you remain subservient and therefore unfree. The paradigmatic manifestation of domination arises in the history of republican political philosophy around the problem of the master and slave. Even a benevolent master possesses the capacity to arbitrarily interfere in the life chances and autonomous choices of the slave, such that even a well-treated slave remains deeply unfree. In classical republican thought, the concept of domination was readily applied to the dangers of unchecked power of the state.¹⁰ But domination also arises in the context of the concentrated power of *private* actors. Thus a modern theory of domination must see the need for checks and balances not only on government actors, but also on private actors like corporations, where owners and managers can dominate workers and where monopoly firms can dominate other firms. Domination can also exist in more diffuse structural contexts where there are many dominators rather than one single dominator. A quintessential example of this more structural form of domination can be found in patterns of discrimination and unequal economic opportunity: in both cases, there may not be a singular, discrete dominator. Rather, it is the aggregation of a myriad of policies, activities, and transactions that

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8. The discussion in this Part offers a condensed version of an argument that I have presented elsewhere. See K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2016) [hereinafter RAHMAN, *DEMOCRACY AGAINST DOMINATION*]; Rahman, *Domination*, *supra* note 6, at 1337–44; K. Sabeel Rahman, *Democracy Against Domination: Contesting Economic Power in Progressive and Neorepublican Political Theory*, *CONTEMP. POL. THEORY* (2016).
 9. PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997) [hereinafter PETTIT, *REPUBLICANISM*]. There is a rich and growing literature on the philosophical and historical foundations of domination as a moral framework for progressive politics, although it should be noted that there are extensive debates about how precisely to formulate the concept. See, e.g., ALEX GOUREVITCH, *FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY* (2015); PHILIP PETTIT, *ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY* (2012); Patchen Markell, *The Insufficiency of Non-Domination*, 36 *POL. THEORY* 9 (2008).
 10. See PETTIT, *REPUBLICANISM*, *supra* note 9.

combine to significantly narrow the freedom and agency of minorities, or of workers, or of the poor.

Domination as a concept captures a wide range of the moral harms in an economically unequal society: the subjugation of workers to corporations, of the public as a whole to monopolies and “too-big-to-fail” banks, and the ways in which diffuse patterns of discrimination or market structures might constrain individual and collective freedom.

Domination also suggests a more compelling set of constructive values with which we can shape the projects of advocacy and reform. The alternative to domination is *freedom*—the freedom for individuals and communities to have agency, to shape their own lives, to have a shared voice in the governing and restructuring of social, economic, and political arrangements. The freedom that domination threatens—the freedom we must seek to realize—is much more than the libertarian freedom of consumer choice and market transaction that animates conservative visions of “free” markets, limited government, and *Lochnerian* notions of constitutional jurisprudence.¹¹ Rather, it is the richer freedom to live lives we each have reason to value, a freedom that is expanded with our capacities and capabilities to have real agency in the world. In short, it is the freedom of being an *agent*, capable of authoring one’s own life and co-authoring collectively our shared political, social, and economic life. This is the freedom that is constrained by the accumulation of unchecked power, whether by the state, the corporation, or the market itself.

The antithesis of our inequality crisis, then, is not more equality in the narrow sense of income redistribution. Rather, if the real problem is one of domination—arbitrary, unchecked power in the economy—then to overcome these challenges we must do more to ensure that all Americans have real, meaningful freedom to shape their own lives—and that means have a real voice, a real share of *power* in economic, social, and political realms.

These concepts of domination and agency capture an important tradition of radical political economy in American thought, from Thomas Paine to abolition, to elements of civil rights and economic justice movements of the War on Poverty era.¹² But it perhaps gets its fullest treatment in the reform discourse arising from the crises of the first Gilded Age: the Populists, Progressives, and labor republicans of the late nineteenth and early twentieth centuries.¹³ For these reformers, the problems of industrial capitalism were fundamentally problems of domination: the domination of workers by managers and corporations; the domination of the public as a whole by the new monopolies and corporate titans of finance, oil, and railroads; and the more diffuse forms of structural domination arising from the legal structures of the market itself which

11. See GILLMAN, *supra* note 4.

12. See, e.g., AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2010); MARC STEARS, *DEMANDING DEMOCRACY: AMERICAN RADICALS IN SEARCH OF A NEW POLITICS* (2010).

13. See generally BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998); GOUREVITCH, *supra* note 9; CHARLES POSTEL, *THE POPULIST VISION* (2007); DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* (1998).

condemned many to low wages. The myriad responses to the problem of domination were, at heart, efforts to reclaim a greater degree of political agency and power for “we the people,” whether through the creation of direct democracy practices like ballot referenda and direct election of senators; or the organization and mobilization of individuals through the labor, suffrage, and consumer rights movements; or the attempts to subject private power and the market itself to the public good through regulatory innovations like antitrust law and public utilities.

II. INEQUALITY AND ECONOMIC FREEDOM IN THE NEW GILDED AGE

This moral focus on the problem of domination and the value of agency provides a framework for understanding, prioritizing, and driving forward key fronts for progressive economic and social change in an era of inequality. The ideas of domination and freedom also help distill and elevate the arguments arising from the variety of economic justice and reform movements shaping today’s political landscape.

A. *Curbing Concentrated Private Power*

The first frontier highlighted by the problem of domination is the threat of concentrated private power. In June of 2016, Senator Elizabeth Warren delivered a headline speech calling for a revival of antitrust regulation and enforcement.¹⁴ Antitrust, in Warren’s view, was not just a technical matter of economic efficiency or consumer welfare; rather it implicated fundamental values of freedom and democracy. “Consolidation and concentration,” she declared, “are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy.”¹⁵ Warren is not alone in this recovery of antitrust principles: Zephyr Teachout, another law professor-turned-candidate, has made antitrust and the problems of new monopolies like Comcast and big agribusiness central to her work as a scholar and her campaign critique of an unfair and unequal economy.¹⁶ Warren’s speech comes on the heels of an upsurge of research and policy studies warning that the increased concentration of sectors from food to telecom has reduced competition, undermined economic vibrancy, and extracted rents from consumers—in the aggregate, contributing to inequality.¹⁷

14. Senator Elizabeth Warren, Keynote Remarks at New America’s Open Markets Program Event: Reigniting Competition in the American Economy (June 29, 2016), http://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf [<http://perma.cc/8FXA-3FWW>].

15. *Id.*

16. See Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL’Y 1 (2014); see also *Campaign Issues*, ZEPHYR TEACHOUT FOR CONGRESS, <http://www.zephyrteachoutforcongress.com/> [<http://perma.cc/9WRH-N688>].

17. See, e.g., Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL’Y REV. (forthcoming).

Indeed, historically antitrust has been a key front-line for small-c constitutionalism. In an industrializing economy marked by vast new corporate powers, antitrust emerged in the late nineteenth century as a key strategy for preserving economic freedom against monopolies and oligopolies that would limit entrepreneurship, innovation, and competition, and extract rents from businesses and consumers. Antitrust was also seen as a critical bulwark protecting political freedom, by limiting the bleeding of concentrated economic power into political influence, hijacking the policy process to favor these corporate giants.¹⁸

Nor is the problem of private power limited to the resurgence of classic monopolies. New forms of private power also pose similar threats to opportunity and equality: whether in the form of Google's control over information and search; Amazon's vast infrastructure for retail sales; Comcast and Verizon's battles against net neutrality and continued efforts to monopolize broadband access; and the spectacular rise of online platforms like Uber and Airbnb raising implications for urban policy and access.¹⁹ The persisting anxieties about too-big-to-fail finance, and the threats of financial exploitation of consumers, businesses, and even cities reflect, a twenty-first century version of the old Progressive Era fear of "Big Finance" as the ultimate private threat to economic and political liberty.²⁰

If concentrated private power represents one key front-line for combating inequality and reviving economic freedom, what are the remedies? While there is a jurisprudential element in the doctrinal treatment of antitrust statutes, the key frontiers are in the realms of public philosophy—reclaiming the moral critique of private power—and the domains of statutory and regulatory change. Indeed, many of the proposals for curbing private power today involve expanded regulatory oversight by agencies like the Federal Trade Commission, the Federal Communications Commission, and financial regulators at the Federal Reserve and the Securities and Exchange Commission, as well as legislative solutions.²¹ This is small-c constitutionalism at work: a moral critique highlight-

2017); *Benefits of Competition and Indicators of Market Power*, COUNCIL OF ECON. ADVISERS (2016), http://www.whitehouse.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf [<http://perma.cc/PPP4-P7JF>]; Jason Furman & Peter Orszag, Presentation at "A Just Society" Centennial Event in Honor of Joseph Stiglitz, Columbia University: A Firm-Level Perspective on the Role of Rents in the Rise of Inequality (Oct. 16, 2015), http://www.whitehouse.gov/sites/default/files/page/files/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf [<http://perma.cc/2PLD-84UG>].

18. See, e.g., THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS (Osmond K. Fraenkel ed., 1935).
19. K. Sabeel Rahman, *Curbing the New Corporate Power*, BOS. REV. (May 4, 2015), <http://bostonreview.net/forum/k-sabeel-rahman-curbing-new-corporate-power> [<http://perma.cc/AP6Y-698K>].
20. See RAHMAN, DEMOCRACY AGAINST DOMINATION, *supra* note 8, at ch.7.
21. See, e.g., Warren, *supra* note 14, at 6–7 (proposing stricter FTC oversight of mergers and technology firms); *Untamed: How To Check Corporate, Financial, and Monopoly Power*, ROOSEVELT INST. (Nell Abernathy, Mike Konczal & Kathryn

ing structural threats to freedom in our economy, seeking remedies through the interaction of social movements and legislative and regulatory bodies charged with governing the economy.

B. Counteracting Diffuse Market Power

The second form of economic power highlighted by the concept of domination involves not the discrete threat of concentrated private power, but the more diffuse, structural inequalities arising from the market system itself.

Consider the following real-time movements. In an economy increasingly dominated by low-wage, precarious work without benefits—in industries like apparel, restaurants, and retail—a growing consortium of workers, organizers, and communities have combined to push the Fight for Fifteen, to raise the minimum wage to \$15 an hour.²² Meanwhile, organizations like the Freelancers' Union have sought to establish access to basic benefits like healthcare and pensions for freelancers who operate in the "gig" or "on-demand" economy without the benefits that accompany full-time employment. The reality is that a growing share of today's workers do not enjoy the benefits that, for much of the twentieth century, accompanied full-time work, as a central component of the moral social contract between business, government, and communities. This erosion of the social contract is not just the result of corporate policy change; rather, it stems from a structural shift in the organization of work—a shift with which our public policies have not kept pace. Through outsourcing and franchising, many industries have shuttled their workers outside of the lead corporation, and are no longer responsible for providing these benefits, in a process that economist and now-Department of Labor administrator David Weil calls the "fissuring of the workplace."²³

The social contract represents another manifestation of small-c constitutional battles over securing economic freedom for all. Through legislative and regulatory initiatives, the social contract promises protection from economic risk, enabling upward mobility. A key challenge for economic freedom today lies in reinventing and expanding the social contract to ensure economic freedom given the changing nature of work—and to include constituencies long since excluded from conventional labor protections, including women and communities of color. The policy agenda here likely involves the creation of a more portable and universally accessible approach to providing benefits like pensions, unemployment insurance, and access to healthcare.²⁴ This means up-

Milani eds., June 2016), <http://rooseveltinstitute.org/wp-content/uploads/2016/06/Untamed-Final-Single-Pages.pdf> [<http://perma.cc/C95M-SHP3>].

22. See DAVID ROLF, *THE FIGHT FOR \$15: THE RIGHT WAGE FOR A WORKING AMERICA* (2016).
23. DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014); see also SARU JAYARAMAN, *FORKED: A NEW STANDARD FOR AMERICAN DINING* (2016); ROLF, *supra* note 22.
24. On the creation of portable and universal benefits decoupled from full-time work, see, for example, Nick Hanauer & David Rolf, *Shared Security, Shared Growth*, DEMOCRACY, Summer 2015, <http://democracyjournal.org/magazine/37/shared>

dating our statutory and regulatory frameworks for social policy. But it also requires making the public moral argument for a twenty-first century safety net, in opposition to the push to trim or further reduce these benefits.

C. *Participation, Public Policy, and Democratic Social Change*

The third frontier for an anti-domination approach to economic freedom intersects with these first two. Government obviously plays a major role in enacting and enforcing the policies meant to secure economic freedom against private and market power. But how do we ensure that governmental institutions themselves do so in ways that are responsive to the public's needs and aspirations? The answer lies in the centrality of democracy in driving these anti-domination reforms to our economic structures. As the discussion above suggests, participation, social movements, and civil society actors are key to driving the policies that would counteract economic domination—and mitigate against the risk of unresponsive, unaccountable public power.

Indeed, in addition to policies that alter economic structures to minimize domination by private actors or by market systems, the focus on domination and agency suggests that we must also be mindful about political inequities—about disparities in how the state itself might respond to the needs and voices of different constituencies. This is a major dimension of the current inequality crisis. We have a growing set of studies documenting the ways in which the U.S. political process is empirically more responsive to the preferences of wealthier citizens.²⁵ Legislators may be dependent on campaign funders and donors.²⁶ Elected officials may share a common socioeconomic or cultural background as

-security-shared-growth/ [http://perma.cc/77PL-NY9Y]; *Common Ground for Independent Workers*, WHAT'S THE FUTURE OF WORK? (Nov. 10, 2015), <http://medium.com/the-wtf-economy/common-ground-for-independent-workers-83f3fbcf548f> [http://perma.cc/U4YF-NBC6]; David Rolf, Shelby Clark & Corrie Watterson Bryant, *Portable Benefits in the 21st Century: Shaping a New System of Benefits for Independent Workers*, ASPEN INST. (2016), http://assets.aspeninstitute.org/content/uploads/files/content/upload/Portable_Benefits_final.pdf [http://perma.cc/6VBE-5VZT]; Shayna Strom & Mark Schmitt, *Protecting Workers in a Patchwork Economy*, CENTURY FOUND. (Apr. 7, 2016), <http://tcf.org/content/report/protecting-workers-patchwork-economy/> [http://perma.cc/GB9E-CAAF].

25. See LARRY BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008); MARTIN GILENS, *AFFLUENCE & INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSP. ON POL.* 564 (2014); Benjamin I. Page, Larry M. Bartels & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 *PERSP. ON POL.* 51 (2013).
26. See LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011); ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED* (2014).

economic elites, leading them to favor more elite-friendly policies.²⁷ Business interests may be more effective in organizing as an interest group, particularly in their investment in the ecosystem of lobbying, advocacy, and model legislation organizations leveraged to influence federal and state legislatures.²⁸ The decline of organized labor may have accelerated this shift in the balance of power among such lobbying and advocacy groups.²⁹ Legislatures themselves may be especially vulnerable to these disparities in lobbying influence, in part because of their own declining resources—financial, human, temporal—to conduct independent policy research and draft legislation.³⁰

The breadth of the problems of political inequality and unresponsiveness suggests both the importance and limitations of efforts to promote campaign finance reform and to expand voting rights. These are no doubt central fault lines in the battle against inequality. But they must also be complemented by innovations to make regulation and governance outside of the legislature more inclusive and equitable. This represents another key domain for an anti-domination-oriented approach to undoing structural inequalities.

Consider for example recent developments in local economic development policies. Urban economic development carries with it the promise of redressing structural disparities in economic opportunity and wellbeing. But a central challenge in urban development is how to ensure that deals struck with developers over major new projects actually produce benefits for local constituencies, whether in the form of hiring local workers or investing in community needs like green space, schools, or affordable housing. Such community benefits are often agreed to but later ignored, as developers capture or simply run roughshod over local government bodies. However, in response to organized grassroots pressure for more equitable urban development, some cities are creating representative oversight bodies to address this problem. In Oakland, for example, a city-chartered oversight body, comprised of representatives from the developers and community organizations, monitors the massive redevelopment of the old Oakland Army Base. This body not only provides a foothold of oversight power for all affected stakeholders, but also provides a forum for airing grievances, thereby empowering community organizations and civil society groups to bring claims where the developers are falling short of commitments. This oversight body in a vacuum does not produce this power, but in combina-

27. See NICHOLAS CARNES, *WHITE COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY MAKING* (2013).

28. See Alexander Hertel-Fernandez & Theda Skocpol, *How the Right Trounced Liberals in the States*, *DEMOCRACY*, Winter 2016, <http://democracyjournal.org/magazine/39/how-the-right-trounced-liberals-in-the-states/> [http://perma.cc/4DCW-DQQU].

29. See JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* (2010).

30. See Lee Drutman, *Political Dynamism: A New Approach To Making Government Work Again*, *NEW AM.* (Feb. 2016), http://static.newamerica.org/attachments/12404-political-dynamism-2/political_dynamism.c416ce23ca23482b8da8f0feafi4dbb3.pdf [http://perma.cc/YH7S-6XVL].

tion with sustained community organizing in the area, it provides a critical forum and lever through which community groups can build and exercise countervailing power.³¹

At the federal level, the early success of the Consumer Financial Protection Bureau (CFPB) offers a similar example. Substantively, the work of the CFPB speaks to the challenge of protecting individuals and communities from structural inequities and vulnerabilities in financial products markets. But in executing this mission the agency operates not just as a traditional expertise-oriented regulator; it also works hard to engage the public in general, and consumer advocates in particular, to identify issues in need of policy solutions, in effect channeling consumer interests in a regulatory ecosystem that often leaves ordinary people out of view. This focus is partly a result of statutory directives—the CFPB has dedicated offices for outreach to and engagement with constituencies that may have particular needs but are often overlooked in financial regulation policy, such as veterans, students, and pensioners—but it is also a result of the agency's personnel, character, and ethos, as many individuals working in the CFPB are themselves veterans of the consumer rights movement.³²

If private power and market power pose threats to economic freedom, so too does the unresponsiveness of the political institutions established to regulate, govern, and oversee the economy. A commitment to preventing domination and expanding agency implies a commitment to making such governance more inclusive and responsive. In the electoral domain, the challenges of redressing disparities in voting rights, campaign finance, and lobbying influence are familiar and necessary components of this focus on political inclusion. But inclusion must also manifest in reforms to the many other institutions of day-to-day governance like cities, municipal bodies, and regulatory agencies.

III. CONSTITUTIONALISM AND SOCIAL CHANGE

This brief accounting of the major front-lines for battling domination and expanding democratic agency suggests a distinctive theory of change, one that follows the lines of 'small-c' constitutionalism described earlier. The above discussion does not provide a blueprint of solutions, but it does offer a normative framework for diagnosing the threats to freedom in today's unequal economy. It also implies the distinctive elements of a small-c constitutionalist theory of social change.

31. See K. Sabeel Rahman, *The Key To Making Economic Development More Equitable Is Making It More Democratic*, NATION (Apr. 26, 2016), <http://www.thenation.com/article/the-key-to-making-economic-development-more-equitable-is-making-it-more-democratic/> [http://perma.cc/7ZDB-R7PR].

32. For a discussion of the CFPB as a democracy-enhancing regulatory institution, see RAHMAN, DEMOCRACY AGAINST DOMINATION, *supra* note 8. For a broader discussion of how regulation can be converted into a more inclusive and democratic system for policymaking, see *id.* at ch.7; and K. Sabeel Rahman, *Rethinking Regulation: Preventing Capture and Pioneering Democracy Through Regulatory Reform* (Roosevelt Inst. White Paper, 2016), <http://rooseveltinstitute.org/rethinking-regulation/> [http://perma.cc/PM3P-ZY9V].

First, in each of the front-lines described above of private power, market power, and participation, we see the role of movements that prioritize public philosophy and the battles over ideas and values as a key driver of social change. This is constitutionalism as public philosophy, an effort to re-moralize our prevailing languages of economic and social policymaking, explicitly casting these efforts not as technical matters of policy design, but rather as expressions of fundamental values. Movements here are operating at the moral and constitutional level of values, not merely as policy advocacy. The technicalities of wages, market share, or other facets are embedded in a broader narrative about dignity, inclusion, and freedom. The goal is to thicken our public commitments to economic freedom.

Second, the policies proposed focus on altering the underlying structures that allocate power in our polity, economy, and society. This is constitutionalism in the sense of “designing structures.” Just as the Constitution itself seeks to protect liberty by structuring governmental power through the separation of powers and federalism, freedom in the New Gilded Age requires a similar attention to structuring power as it is manifest in the market—for example through antitrust and market structure reforms—or in the polity—through a focus on voting rights, campaign finance, and also the structures of other policymaking institutions like cities, states, and regulatory agencies. This shift to a focus on systems and structures is important, forcing us to push policy proposals that are more than ad hoc reactions to symptoms rather than addressing root causes.

Third, these claims are primarily oriented towards legislative and regulatory policymaking forums. Several scholars have argued for reclaiming the city as an arena in which to incubate progressive policy change, as a springboard into large-scale federal reform.³³ It is no surprise that many of the efforts to contest structural inequality and concentrated corporate power (such as in the cable monopoly and municipal broadband context) have started to gain traction at the city level. The administrative state and the regulatory process are also important forums in which these moral claims can become instantiated in the policies that structure our economy, as battles over net neutrality and financial reform indicate.³⁴ By broadening the set of target policymaking arenas, this view of social change multiplies vectors for advocacy and policy innovation.

33. See, e.g., David J. Barron, *Foreword: Blue State Federalism at the Crossroads*, 3 HARV. L. & POL’Y REV. 1 (2009); Heather K. Gerken, *Dissenting by Deciding*, 56 STAN. L. REV. 101 (2005).

34. For more on this appeal to regulation as a forum for social movement advocacy and for working out the practical implications of fundamental moral and even constitutional claims, see the emerging literature on “administrative constitutionalism.” See, e.g., SUSAN CRAWFORD, *CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE* (2013); RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2010); JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* (2012); SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014); Metzger, *supra* note 2; Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015).

We should note what is missing in this theory of change: constitutional doctrine and courts. The rough sketch of economic freedom provided in Part I could easily motivate a framework for progressive constitutional jurisprudence. Anti-domination might be a moral value that animates doctrinal shifts to prevent the entrenchment of political power through gerrymandering or campaign finance corruption,³⁵ while suggesting an affirmative basis for a constitutional right to a meaningful political voice—what Spencer Overton calls “the participation interest.”³⁶ The thick conception of freedom suggested in Part I might also resonate with debates in the aftermath of the marriage equality cases³⁷ to consider what hybrid Equal Protection and Due Process dignity-based rights might look like—an idea that has resonated with theorists of robust Fourteenth Amendment rights of inclusion, standing, and equality.³⁸

These points of entry into constitutional doctrine are well worth exploring, but ultimately their tractability is a product not of constitutional argumentation, but of the broader battle over the public philosophy and on-the-ground public policies we develop in this New Gilded Age. As the marriage equality debate suggests, doctrinal changes can follow more readily on the heels of a broader and longer-term movement to shift norms, values, and policies which eventually can gain broader acceptance nationally and constitutionally.³⁹

Courts and constitutional interpretation remain important as deep reservoirs of moral language and public philosophy. The difference, however, is that rather than targeting courts and constitutional interpretation as a way to short-circuit the long pathways to changing norms, values, and ultimately policies, we ought to engage this moral role of courts at a later stage in the process of social change. We therefore engage the more familiar terrain of constitutional text, doctrine, and interpretation as but one component of a broader ecosystem of social change efforts—not to bypass the political process, but rather to provide a point of entry for the public philosophical accounts of political economy that gradually emerge out of movement organizing, advocacy, and policy experimentation at the state or local level.

This does not mean we abandon the moral force of constitutional rhetoric; rather it means we take our constitutional claims—claims about fundamental moral values and claims about the ways in which power is allocated and institutions are structured so as to comport with those values—into other terrains of law and policy. This blurring of the lines between constitutional and other forms of law diminishes the centrality of the constitutional text and the Su-

35. See, e.g., Yasmin Dawood, *The Antidomination Model and Judicial Oversight of Democracy*, 96 GEO. L.J. 1411 (2008); see also LESSIG, *supra* note 26; TEACHOUT, *supra* note 26.

36. Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259 (2012).

37. Justice Kennedy has been the biggest proponent of a dignitarian approach to substantive rights under the Fourteenth Amendment. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003).

38. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

39. See, e.g., DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (2016).

preme Court even as it elevates the moral power and stakes of the legal and policy battles occurring elsewhere. It also opens up a more realistic and compelling theory of social change, where progressive political economy is constructed over time through a battle of ideas and values, through the “guerrilla warfare” of instantiating those values through changes in the law of markets and businesses, and through the mechanisms of administrative agencies and local governments.

CONCLUSION

The many dimensions of a progressive account of economic freedom in this New Gilded Age cannot be fully exhausted in this brief Essay. But the above sketch indicates a number of key points. First, we must conceptualize the problem of inequality as a broader problem of *freedom from domination*, implicating not only our most foundational moral values, but also the structures that literally constitute our social, economic, and political order. Second, in seeking to reform these structures to redress inequities, we must focus particularly on the threats posed by (i) concentrated private power; (ii) diffuse market power; and (iii) unresponsive public power. This provides an agenda for substantive socioeconomic policy change, as well as for processes of policymaking that are inclusive and participatory. Third, the kinds of movements and policy reforms implied by this approach suggest a very different theory of change, pointing towards a constitutionalism that prioritizes social movements, public philosophy, and statutory or regulatory policies rather than a narrow focus on constitutional text, doctrine, and judicial interpretation.

At the same time, a note of caution is in order. It is important not to subsume all good things into our preferred moral frameworks. While I am optimistic about the capacious notice and moral force of the anti-domination/freedom-as-agency approach, I do not think that it necessarily encompasses all the familiar progressive and liberal policies of the last few decades.

For example, the New Deal social contract served many twentieth century workers well, making pensions, healthcare, and other benefits contingent on full-time employment. But not only did the New Deal order exclude many women and minorities, it is also not clear that restoring this arrangement is necessarily the best way forward in a rapidly changing economy. Perhaps we need to depart from the work-based model of social insurance altogether. A domination-reducing, freedom-enhancing social contract for the twenty-first century may well look very different, perhaps departing from work-based models of social insurance, providing a thicker defense for the moral value of leisure and work flexibility in a world marked by freelancers, contingent workers, and fissured workplaces.

Similarly, we may have to reject our familiar attraction to presidentialism, centralization, and expertise as the primary modes of governing economic arrangements, in favor of a more decentralized, messy, but ultimately democratic view of politics. Indeed, I would argue that twentieth century liberalism has generally combined two impulses: first, an unease with overtly moralized foundations for law and public policy; and second, an infatuation with managerialism and economic expertise. In a world where law and policy are primarily the products of elite judges or expert regulators, it makes sense to shift from the moralized and democratic register of public philosophy and social movements

to the more rarefied, apolitical register of law and expertise. In both cases, liberalism has fallen into the siren call of neutrality, the neutrality of process and the neutrality of expertise, both of which promise seemingly objective and incontrovertible foundations for liberal policy prescriptions, but neither of which can, by themselves, provide the necessary moral persuasion or justification for those policies. A progressive political economy founded on the problem of domination and the affirmative value of freedom as agency provides a more openly moral foundation for the kinds of progressive social change we hope to achieve.⁴⁰

The point is that we have to resist the impulse to make our account of progressive political economy so broad that it absorbs all past, present, and future liberal positions, to the point where it loses its own coherence, distinctiveness, and moral force. Anti-domination and freedom-as-agency are, in a sense, timeless values with deep roots in our tradition. But in another sense, they are also radical ones that have often been rejected in the history of American politics, even among liberals. Given the scale of social, economic, and political crisis we face today, it is more urgent than ever to look past the familiar comforts of top-down or depoliticized views of economic reform to recover a thick, moral account of economic freedom and domination of the sort sketched above. Such an account may be controversial, but it also animates the very real social movements working to reshape our social, economic, and political structures to be more democratic, inclusive, and egalitarian. This is the kind of radicalism that we should recover, and in which we should place our faith.

40. See RAHMAN, DEMOCRACY AGAINST DOMINATION, *supra* note 8, at ch.2.